No. SC84917

IN THE SUPREME COURT OF MISSOURI

FALL CREEK CONSTRUCTION COMPANY, INC.

Appellant,

v.

DIRECTOR OF REVENUE,
STATE OF MISSOURI

Respondent.

ON PETITION FOR JUDICIAL REVIEW OF THE
DECISION OF THE MISSOURI ADMINISTRATIVE
HEARING COMMISSION

REPLY BRIEF OF APPELLANT

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III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN CONCLUDING THAT FALL CREEK IS RESPONSIBLE FOR PAYMENT OF USE TAX ON ITS OWNERSHIP INTEREST IN A FRACTIONAL AIRCRAFT OWNERSHIP PROGRAM, BECAUSE FALL CREEK HAS NOT EXERCISED SUFFICIENT DOMINION OR CONTROL OVER THE INTERESTS IN EACH AIRCRAFT TO CONSTITUTE "STORAGE" OR "USE" OF AN AIRCRAFT IN THE STATE OF MISSOURI UNDER §§ 144.610 AND 144.605(13), RSMo. 2000, IN THAT RAYTHEON MAINTAINED CONTROL OF THE AIRCRAFT AND FALL CREEK MERELY CONTACTED RAYTHEON TO REQUEST TRANSPORTATION TO A PARTICULAR LOCATION.

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Director of Revenue v. Superior Aircraft Leasing Co., 734 S.W.2d 504 (Mo.banc 1987)

Nubo, Ltd. v. Director of Revenue, No. RS-84-1778 (Mo. Administrative Hearing Commission, December 30, 1987)

§ 144.610, RSMo. 2000

LEGAL ARGUMENT

I. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN CONCLUDING THAT FALL CREEK IS RESPONSIBLE FOR PAYMENT OF USE TAX ON ITS OWNERSHIP INTEREST IN A FRACTIONAL AIRCRAFT OWNERSHIP PROGRAM, BECAUSE THE INTERESTS IN EACH AIRCRAFT CONVEYED TO FALL CREEK DO NOT CONSTITUTE "TANGIBLE PERSONAL PROPERTY" UNDER § 144.610, RSMo. 2000, IN THAT THE SUBSTANCE OF THE TRANSACTION IN QUESTION WAS THAT FALL CREEK PURCHASED NOT TANGIBLE PROPERTY BUT ONLY THE RIGHT TO USE ANY ONE OF ONE HUNDRED TEN (110) AIRCRAFT FOR A SPECIFIED NUMBER OF HOURS PER YEAR AND THAT SUCH RIGHT TO USE THE AIRCRAFT IS A NONTAXABLE SERVICE.

Fall Creek purchased a fractional ownership interest in two aircraft, giving Fall Creek the right to utilize the aircraft without assuming the obligations of aircraft ownership. Fall Creek could have purchased an aircraft, but it did not. Although Fall Creek's purchase carried with it some of the benefits and burdens commonly associated with ownership (i.e. the benefit of depreciation and the burden of payment for maintenance, etc.), Fall Creek did not intend to, and did not, purchase one or more

aircraft. Instead, Fall Creek desired and purchased the right to utilize an air transportation service.

Every jurisdiction to have considered the issue has held that fractional ownership programs like the one involved here constitute air transportation services, not taxable tangible personal property. On appeal, the Director does not address the authority from other jurisdictions. The New York, Texas, and Federal Circuit authority, all of which deal with situations like the one here, a situation not previously considered in Missouri, should guide this Court. That this Court should defer to the authority favorable to Fall Creek from other jurisdictions is reinforced by the fact that Missouri law demands that tax statutes be construed in favor of the taxpayer. Sec. 136.300, RSMo. 2000; *Sneary v. Director of Revenue*, 865 S.W.2d 342, 344 (Mo.banc 1993). To the extent that there is any question regarding whether Fall Creek purchased the right to use a nontaxable transportation service or tangible personal property, all doubt should be resolved in Fall Creek's favor.

The Director does seek to distinguish the "true object" Missouri cases relied upon by Fall Creek, citing *Sneary*. Of course, the problem with *Sneary*, and the other "true object" cases is that none deals with a fractional ownership aircraft program, or even with a similar situation. Therefore, to try to glean some sort of factual resolution from the case, as the Director has tried to do, proves fruitless. *Sneary* and the other "true object" cases are helpful, however, because they make clear that the "true object" of a transaction must be considered in determining whether a purchase constitutes tangible personal property. "This Court has recognized, however, that the 'true object' or 'essence of the

transaction' determines whether to treat a transaction as a taxable transfer of tangible personal property or the nontaxable performance of a service. The test focuses on the essentials of the transaction to determine the real object the buyer seeks." *Id.* at 345. Considering the persuasive authority from other jurisdictions and considering the real object the buyer seeks, it is clear that this Court should hold that Fall Creek purchased a nontaxable right to use an air transportation service rather than tangible personal property.

Clearly, the aircraft themselves were of considerable value. But, contrary to the Director's argument, this is not the issue. Had Fall Creek desired an aircraft, it could have and would have purchased an aircraft outright. Fall Creek did not desire an aircraft, with its consequent benefits and burdens. Fall Creek instead wanted air transportation service without all of the benefits and burdens associated with ownership. Fall Creek should not be penalized for exercising its legal right to purchase a nontaxable air transportation service.

II. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN CONCLUDING THAT FALL CREEK IS RESPONSIBLE FOR PAYMENT OF USE TAX ON ITS OWNERSHIP INTEREST IN A FRACTIONAL AIRCRAFT OWNERSHIP PROGRAM, BECAUSE THE IMPOSITION OF THE USE TAX ON SUCH PROGRAM IS AN IMPERMISSIBLE BURDEN ON INTERSTATE COMMERCE IN VIOLATION OF THE COMMERCE CLAUSE OF THE UNITED STATES CONSTITUTION AND § 144.030, RSMo. 2000, IN THAT THE NUMBER OF FLIGHTS TAKEN INTO MISSOURI BY 713TA AND 798TA FOR THE TAXPAYER'S BUSINESS DO NOT CREATE A SUBSTANTIAL NEXUS UNDER THE TESTS SET FORTH BY THIS COURT IN *DIRECTOR OF REVENUE V. SUPERIOR AIRCRAFT LEASING CO.*

Fall Creek's purchase of the right to use an air transportation service provided by Raytheon is not subject to Missouri's Use Tax because Fall Creek did not purchase tangible personal property. Even if the Director could otherwise establish that the fractional ownership program qualifies as tangible personal property for purposes of Missouri's Use Tax, the Director's assessment of use tax against Fall Creek still would be improper because Fall Creek's use of the aircraft in Missouri does not satisfy the *Superior Aircraft* test.

Recognizing that the aircraft's contacts with Missouri out of the aircraft's total flights are so few as to not withstand constitutional challenge, the Director claims that substantial nexus should be decided based only on Fall Creek's use of the aircraft, not total aircraft use. The problem with this argument is that the Director impermissibly seeks to have it both ways. On the one hand, the Director argues that Fall Creek is an aircraft owner and should be expected to pay tax like any other owner. On the other hand, the Director acknowledges, for purposes of the substantial nexus requirement, that this is not an ordinary ownership situation and claims that all other "owners" should be disregarded for purposes of the substantial nexus test. Certainly the Director should not be permitted to disclaim its argument about ownership when it becomes convenient to do so. Considering the aircraft's nexus with Missouri out of the total flights taken, it is plain that neither aircraft had a substantial nexus with Missouri.

The Director dismisses the other requirements of the *Superior Aircraft* test and claims that the real issue is whether Missouri is taking a share of taxes rightfully belonging to another state. According to the Director, under Fall Creek's analysis, the aircraft would never have a substantial nexus with any state. That is not true. One can easily envision a situation where the fractional program, if considered tangible personal property instead of an aircraft service, could be deemed to have a substantial nexus with another state. For example, if the airplane is hangared and maintained in a single state, and the party in question regularly makes intrastate flights in the airplane, the airplane would have a substantial nexus to the state under *Superior Aircraft*. However, in this case, the airplane is not hangared or maintained in Missouri, and Fall Creek does not

make any intrastate flights in the airplane. On these facts, there is no substantial nexus. Contrary to the Director's repeated arguments, it is not Fall Creek's burden to show that another state has the right to tax its purchase in connection with the fractional ownership program. As this Court knows, the tax statutes and regulations are to be interpreted in the taxpayer's favor. The Director bears the burden of proving that it has satisfied Missouri and federal constitutional, statutory, and regulatory requirements in making the assessment. Sec. 136.300, RSMo 2000. *See also Six Flags Theme Parks, Inc. v. Director of Revenue*, 2003 WL 113456, at *3 (Mo. Jan. 14, 2003) ("[I]t is the Director's burden to show a tax liability.").

III. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN CONCLUDING THAT FALL CREEK IS RESPONSIBLE FOR PAYMENT OF USE TAX ON ITS OWNERSHIP INTEREST IN A FRACTIONAL AIRCRAFT OWNERSHIP PROGRAM, BECAUSE FALL CREEK HAS NOT EXERCISED SUFFICIENT DOMINION OR CONTROL OVER THE INTERESTS IN EACH AIRCRAFT TO CONSTITUTE "STORAGE" OR "USE" OF AN AIRCRAFT IN THE STATE OF MISSOURI UNDER §§ 144.610 AND 144.605(13), RSMo. 2000, IN THAT RAYTHEON MAINTAINED CONTROL OF THE AIRCRAFT AND FALL CREEK MERELY CONTACTED RAYTHEON TO REQUEST TRANSPORTATION TO A PARTICULAR LOCATION.

Even if Fall Creek's participation in the fractional ownership program is deemed the purchase of tangible personal property for use tax purposes, the Director's assessment is improper under sections 144.610 and 144.605(13), RSMo 2000, because Fall Creek did not store or use an aircraft in the State of Missouri, as those terms have been interpreted in Missouri cases.

The Director repeatedly asserts, without citation to authority, that any use is sufficient under the tax statutes, and that Fall Creek's purchase of a fractional share of an aircraft used even once in Missouri is sufficient use to justify imposition of the tax. In making this argument, though, the Director ignores the second sentence of section

144.610, which requires that the tangible personal property must also finally come to rest in Missouri. Because of the "finally come to rest" requirement, the amount of use in Missouri is of critical importance. Under this Court's holdings in *Superior Aircraft* and *King v. L&L Marine Service, Inc.*, the "finally come to rest" requirement is not satisfied unless more than minimal contact is shown. Because the aircraft here had very limited contact with Missouri (S.F. 12-13), the aircraft were not used or stored in Missouri, as those terms have come to be defined in the context of the "finally come to rest" requirement. Furthermore, under the contractual documents between Fall Creek and Raytheon, Raytheon had dominion and control over the aircraft at all times the aircraft was not in the air. Therefore, by virtue of the contractual documents, any use or storage in Missouri was by Raytheon, not Fall Creek.

IV. THE ADMINISTRATIVE HEARING COMMISSION ERRED IN CONCLUDING THAT FALL CREEK IS RESPONSIBLE FOR PAYMENT OF USE TAX ON ITS OWNERSHIP INTEREST IN A FRACTIONAL AIRCRAFT OWNERSHIP PROGRAM, BECAUSE THE INTEREST IN THE AIRCRAFT PURCHASED BY FALL CREEK DID NOT "FINALLY COME TO REST" WITHIN THE STATE OF MISSOURI AS REQUIRED BY § 144.610, RSMo. 2000, IN THAT THE UNDISPUTED EVIDENCE SUBMITTED AT THE HEARING BEFORE THE ADMINISTRATIVE HEARING COMMISSION INDICATES THAT 713TA AND 798TA NEVER CAME TO REST IN THE STATE OF MISSOURI.

Conceding that *Nubo* dictates a result favorable to Fall Creek, the Director urges the Court to disregard *Nubo* and hold that the aircraft at issue did finally come to rest in Missouri. The Director claims that, unless the aircraft are deemed to have finally come to rest in Missouri, they will never be deemed to have finally come to rest anywhere.

As explained above, it is easy to envision scenarios where the aircraft finally come to rest in, and have a substantial nexus with, another state. Fall Creek does not believe it is its burden to prove to the Court that taxation would be proper in another state. As explained above, though, the aircraft come easily be deemed to finally come to rest where they are hangared or maintained and repaired, all outside of Missouri.

While this Court has never articulated the amount of contact with a state required to satisfy the "finally come to rest" requirement, this Court has provided guidance on that issue in *Superior Aircraft* and *King*. In this case, a fractional ownership program is involved, and the contact with Missouri is considerably less than in the three aforementioned cases. No intrastate flights occurred. This case is most factually similar to *Nubo*, where the Administrative Hearing Commission found that the assessment was improper. This Court should look to *Nubo*, as well as the authority from every other jurisdiction to have considered the issue, in deciding whether the fractional ownership program at issue here is taxable.

Finally, the Director refers to the amusing anecdote of former Maine Governor Angus King's cross-country RV trip. The anecdote, though, only makes clear that all objects eventually come to rest. There is no indication of a use tax dispute in that case. If there were a dispute, it would be resolved this June when former Governor King concludes his trip and returns to Maine. The Director's worries about an object being nontaxable because it never finally comes to rest anywhere are unfounded. All tangible personal property finally comes to rest, although certainly not all tangible personal property owned by a Missouri corporation finally comes to rest in Missouri. This Court should not conclude that the assessment is proper based on unfounded fears that the aircraft could never be taxed if not taxed in Missouri.

CONCLUSION

For the foregoing reasons, Fall Creek asks that the Court reverse the AHC's decision and find that the interests purchased by Fall Creek in Raytheon's Fractional Aircraft Ownership Program are not subject to the Use Tax.

Respectfully submitted,

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	)	
Appellant,	)	
v.	)	Case No. SC84917
	)	
DIRECTOR OF REVENUE, STATE OF MISSOURI,	)	
	)	
Respondent.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND CERTIFICATE OF SERVICE

STATE OF MISSOURI)
) ss.
COUNTY OF GREENE)

Pursuant to Rule 84.06(c), counsel for Appellant certifies that this brief complies with the limitations contained in Rule 84.06(b). There are 3167 words in this brief. Counsel for Appellant relied on the word count of his word processing system in making this certification.

Pursuant to Rule 84.06(g), counsel for Appellant certifies that the disk filed herewith has been scanned for viruses and is virus-free.

Further, counsel for Appellant states that Appellant's Reply Brief in the within cause was by him caused to be served, either by hand delivery, facsimile transmission, or by ordinary mail, postage prepaid, in the following stated number of copies, addressed to the following named persons at the addresses shown, all on this 1 ST day of May, 2003:

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P.O. Box 150
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Subscribed and sworn to before me this _____ day of May, 2003.

_____
Notary Public

My commission expires: